BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

COMMENTS OF TELE-COMMUNICATIONS, INC.

Philip L. Verveer
Michael G. Jones
Angie Kronenberg

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

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Tele-Communications, Inc. ("TCI"), hereby submits its Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

TCI agrees that now is an appropriate time for the Commission to reform its broadcast attribution rules. The multichannel video programming distributor marketplace in which the broadcast industry operates has undergone substantial change in recent years. Most notably, the number of video distribution outlets and the breadth and diversity of programming sources has expanded dramatically. These fundamental marketplace

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[1] Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rule Making in MM Docket Nos. 94-150, 92-51 and 87-154 (released Nov. 7, 1996) ("Further Notice").

developments have consistently been the basis upon which Congress and the Commission have reduced regulatory burdens. The Commission should follow this pattern in the area of attribution and further relax current ownership restrictions, not increase regulation.

Specifically, the Commission should:

- Increase the attribution threshold for voting stock from 5 percent to 10 percent in order to increase regulated entities' access to capital and promote a high level of investment in the media business;

- Only attribute stock interests held by passive investors when they exceed 49 percent. The Commission's passive investor safeguards are more than adequate to ensure that passive investors operate in the public interest, and raising the passive investor attribution threshold will increase capital flow, thereby fueling growth and increased competition.

However, TCI does not support the Commission's proposed "equity and/or debt plus" attribution proposal. There is little or no record evidence of any need for making debt and nonvoting equity interests attributable. Similarly, the Commission should not extend the attribution rules to "program suppliers." Before increasing regulation and imposing costs, the Commission should first determine that there is a need for such regulation.

Moreover, the proposed "equity and/or debt plus" rule, including extension of the rule to "program suppliers," is imprecise and overinclusive because it would attribute interests that do not raise issues as to control of licensees, competition, or diversity. Attributing debt and nonvoting equity also will severely constrain access to capital at a time when the industry faces increasing costs from the transition to digital services

and dramatically expanding competitive pressures. Small media entities will be especially vulnerable as capital sources must make difficult decisions as to where to lend and invest given the expanded attribution rules.

Finally, costs for all entities subject to the attribution rules will be increased by the proposal because it would impose significant and ongoing implementation problems. The capital structure of many regulated companies is a moving target for legitimate and important business reasons, including the need to minimize the firm's overall cost-of-capital and maximize shareholder value (typically measured by the stock price).

II. THERE IS SUBSTANTIAL NEED FOR THE COMMISSION TO RELAX ITS ATTRIBUTION RULES AND, IN PARTICULAR, TO: (1) INCREASE THE VOTING STOCK ATTRIBUTION THRESHOLD FROM 5% TO 10%; AND (2) RAISE THE PASSIVE INVESTOR ATTRIBUTION THRESHOLD TO 49%.

TCI supports the Commission's review of its attribution rules and believes that relaxation of the current thresholds is long overdue. Since the Commission raised its attribution levels in 1984,[2] the economic climate and competitive marketplace have drastically changed for the industries affected by the multiple ownership and cross-ownership rules. TCI need not recount in detail here the facts demonstrating that the number of video distribution outlets and the diversity of programming sources has expanded greatly since 1984. The Commission's recent "Annual Assessment of Competition in the Video Marketplace" amply

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[2] Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Report and Order in MM Docket No. 83-46, 97 FCC 2d 997 (1984) ("Attribution Order").

demonstrates this marketplace reality.[3] Fundamentally, the increase in source and content diversity supports a change in the attribution rules, and, specifically, a relaxation of those rules. The proposed tightening of the attribution rules, by contrast, is starkly at odds with the fact that consumers now have vastly more programming choices and many more sources from which to choose. Moreover, not only has competition for viewers increased, but competition for capital resources has increased as well.[4] Thus, relaxing the voting stock attribution benchmark will enhance the ability of media entities to raise additional capital to effectively compete in the marketplace and will promote a high level of investment in these industries.

The fundamental problem with the current attribution rules is that they do not account for the reality that many firms subject to the cross-ownership and multiple ownership rules are part of larger organizations with complex investment strategies and diverse investment interests. The Commission has found that

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[3] See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report in CS Docket No. 96-133, FCC 96-496 (released Jan. 2, 1997) (finding that the number of video distribution outlets has increased).

[4] See, e.g., Michael Selz, Going Public Proved a Rich Experience for Technology Entrepreneurs in '96, Wall St. J., Jan. 31, 1997, at B2 ("Some companies are already faring worse than their founders' fortunes might suggest. The share price of U.S. Satellite Broadcasting Co. . . . . has declined steadily . . . resulting partly from new investment . . . ."); David Lake, Cable Companies Answer the Call of Junk, Corporate Finance, Feb. 1996, at 36-37 ("Junk has now secured a firm place in financing telecommunications companies . . . . [C]ompetition is key. 'The new telecoms industry is a race, and in each market there will be limited survivors.'").

these organizational structures promote the public interest; indeed, Congress and the Commission have adopted policies promoting integration efficiencies[5] and the Commission has approved many mergers and acquisitions in recent years.[6] The attribution rules should be conformed with these policies, thereby expanding regulated firms' access to capital.

Specifically, the Commission should do two things: (1) increase the attribution level of voting stock from 5 to 10 percent; and (2) promote increased investment by passive investors by raising the passive investor attribution threshold to 49 percent.

Increasing the attribution threshold will pose no threat to competition or diversity. Voting stock holdings at 10 percent or below are far from controlling interests. Similarly, ownership

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56, 110-12 (1996); Attribution Order at 1002 (noting that relaxation of the benchmark will serve the public interest because investment in the industry will increase); see also Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, Report and Order in MM Docket No. 94-123, 11 FCC Rcd. 546, 567 & 572 (recognizing that "vertical integration can provide greater efficiencies and better service to the consumer" and that the Prime Time Access Rule "produces inefficiencies that impose significant costs on the consumer.")

[6] Stockholders of Infinity Broadcasting Corp., Memorandum Opinion and Order, FCC 96-495, at ¶ 46 (released Dec. 26, 1996) (granting Westinghouse permanent waivers of the broadcast ownership rules in connection with the transfer of control between Infinity and Westinghouse); Capital Cities/ABC, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 5841, 5851 (1996) (permitting continued ownership of radio-television combinations in connection with the merger of Capital Cities/ABC and The Walt Disney Company); Stockholders of CBS, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 3733, 3738 (1996) (granting temporary waivers of the broadcast ownership rules in connection with the CBS/Westinghouse merger).

interests of 10 percent or below provide little opportunity or incentive for anticompetitive actions such as reducing output and discrimination.

On the other hand, increasing the attribution threshold of voting stock to 10 percent will make available more capital to industries subject to the multiple ownership and cross-ownership rules.[7] Investors will be able to invest greater sums in a diverse array of media entities, including small market participants, without concern that such interests will inhibit their ability to make other remunerative investments. Different types of media outlets offer varying opportunities and risks, and investors should be provided flexibility to take advantage of the opportunities and distribute the risks.

TCI also believes it is perfectly rational for the Commission to differentiate between media entities and passive investors. Passive investors generally are prohibited either by law or fiduciary duties from becoming involved in the operation or control of the companies in which they invest.[8] Moreover, the Commission's attribution policy restricts communication between passive investors and licensees, and each licensee must "certify

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7 The entities subject to the cross-ownership rules include broadcasters, cable operators and newspapers. See 47 C.F.R. § 73.3555 and § 76.501.

8 Review of the Commission's Regulations Governing Attribution of Broadcast Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Notice of Proposed Rule Making in MM Docket Nos. 94-150, 92-51 and 87-154, 10 FCC Rcd. 3606, 3628 (1995) ("1995 Attribution NPRM").

that no such investor has exerted or attempted to exert any influence or control over any of the affairs of the licensee."[9] The Commission's current attribution policy for passive investors is sufficient to ensure that such investors remain passive.[10] Thus, the Commission should go further than its proposed plan to increase passive investors' attributable ownership level to 20 percent and simply ignore investments by passive investors short of control. Such an approach will facilitate regulated media entities' access to capital because it will provide flexibility to passive investors, who will then be allowed to invest up to 49 percent of the equity in a media entity.

In the 1995 Attribution NPRM, the Commission expressed concern that passive investors voting or trading large blocks of stock might affect the management of a media entity, even inadvertently.[11] This concern should not bar the expansion of the passive investor attribution threshold. If passive investors vote or trade (or threaten to vote or trade) their stock in an attempt to control a media entity, such action would be a violation of the Commission regulations referenced above. The Commission should presume that its rules are followed; the mere fear of violation should not provide a basis for rule

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9 Id. at n.92 (citing Attribution Order, at 1014).

10 Passive investors are restricted from contacting or communicating with licensees on any matters pertaining to the operations of the stations, and passive investors or their representatives are prohibited from acting either as officers or directors of licensees. Id.

11 Id.

modifications. Any inadvertent affect a passive investor's decision to sell its stock may have on the management of a regulated entity simply reflects the marketplace at work. For example, a passive investor may sell its stock because it is unhappy with the return on its investment. Any responsive action by management to make the entity more profitable simply is an appropriate reaction to market demands. The Commission should not attempt to regulate where the function of the marketplace is sufficient to protect the public interest.[12]

III. THE COMMISSION SHOULD NOT ADOPT THE "EQUITY AND/OR DEBT PLUS" PROPOSAL.

A. Neither The Commission's Previous Experience Nor Comments In Response To The 1995 Attribution NPRM Provide An Adequate Record Basis For Such A Sweeping Reversal Of The Commission's Attribution Policy.

In the Further Notice, the Commission proposes to implement an "equity and/or debt plus" rule to attribute certain ownership interests, in addition to those interests it already attributes. Thus, where the cross-ownership rules are implicated, or where a "program supplier" to a broadcast station in a given market also holds an interest in another media entity in the same market, the Commission proposes to define as "attributable" any "equity

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12 See Changes in the Entertainment Formats of Broadcast Stations, Memorandum Opinion and Order in Docket No. 20682, 60 FCC 2d 858, 863-66 (1976) ("allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate."), recon. denied, 66 FCC 2d 838 (1977), rev'd sub nom., WNCN Listener's Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), rev'd, 450 U.S. 582 (1981).

and/or debt" interest exceeding a certain threshold.[13] This standard apparently would attribute the following interests:

- any equity interest, including nonvoting stock in whatever form it is held, and voting stock, which exceeds a specified percentage of the total equity of the entity in question;
- any debt holding, in whatever form held, which exceeds a specified percentage of the total debt of the equity in question;
- any "investment interest," including both equity and debt, exceeding a specified percentage of the "total capitalization" of the entity in question.[14]

TCI does not support the Commission's plan to attribute both debt and/or equity. Neither the Commission's prior experience nor the comments filed in response to the 1995 Attribution NPRM support the implementation of such a rule. Before increasing regulation and imposing costs on regulated media entities, the Commission should first determine that there is a need for such regulation.

The Commission has repeatedly rejected attributing debt.[15] In 1984, the Commission stated that debt instruments do not

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13 See Further Notice at ¶ 12.

14 See id. at ¶ 22.

15 For designated entities under the Commission's PCS rules, the Commission only attributes debt if it "results in control being conferred upon the debt holder." Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction at 2 (released June 8, 1995); "[F]inancing agreements may result in a finding of affiliation if the debt relationship essentially gives the creditor the power to control the enterprise -- for example, if the size of the debt is particularly large, the terms of the loan are not commercially reasonable, and the definition of default is unconventional." Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd. 2348, 2396 (1994) ("Second Report and Order").

provide direct influence or control, and "any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee."[16] The Commission also recognized that attributing debt would severely restrict capital resources for both large and small broadcasters because the "sources of debt financing are far fewer than for equity financing."[17]

Similarly, in 1995, the Commission maintained that it should continue to exclude debt from its attribution rules "because any other approach would, we believe, severely impair the ability of the broadcasting industry to obtain necessary capital."[18] Furthermore, the Commission stated that debt financing by institutional lenders is limited and that if it attributed such interests, the broadcast industry would be harmed.[19] It also recognized that, due to the nature of institutional lenders, their ability to influence or control is "remote and minimal."[20] Nonetheless, the Commission sought comment on whether some debt instruments should be attributed when the debtholder has other "close business interrelationships" with a broadcast entity.[21]

In response, no commenter recommended that the Commission attribute debt. Likewise, no commenter recommended that debt and

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16 Attribution Order at 1022.

17 Id.

18 1995 Attribution NPRM, at 3651.

19 Id. at 3652.

20 Id.

21 Id.

equity interests should be aggregated and attributed, except where an entity has the ability to control a licensee in its core decisions.[22] In fact, many of the commenters rejected attributing nonvoting stock interests and debt holdings.[23] Although some commenters discussed whether certain nonattributable interests should be aggregated and attributed, their concern was limited to situations in which nonattributable interests truly represent control.[24]

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[22] Capital Cities/ABC, Inc. recommended that the Commission review some instances of combined nonattributable interests on a case-by-case basis, but only where a party claiming non-attribution has more than a 50 percent stake in the capitalization or equity of the enterprise. (ABC stated that capitalization would exclude moneys provided by banks and traditional lending institutions.) ABC recommended that under such circumstances, the Commission could apply a presumption of attribution which would be rebuttable on "a case-by-case fact-based showing that the 50% plus stakeholder does not have the right to exercise and has not exercised control over the licensee's core areas of programming, personnel and competitive practices." Comments of Capital Cities/ABC, Inc., at 15-16 (May 16, 1995). However, Capital Cities/ABC's concerns are already addressed by the cross-interest policy. Further Notice at ¶ 16. This case-by-case approach allows the Commission to assess any possible issues of control, competition or diversity and any particular circumstances a transaction may present.

[23] See, e.g., Comments of M/C Partners, The Blackstone Group, and Vestar Capital Partners, at 21-22 (May 17, 1995); Comments of Fox Television Stations Inc. and Fox Broadcasting Company, at 14-17 (May 17, 1995); and Reply Comments of The Goldman Sachs Group, L.P., at 16-17 (July 10, 1995).

[24] One commenter recommended that the Commission maintain flexibility and review interests that give an entity de facto control on a case-by-case basis. Consolidated Comments of AFLAC Broadcast Group, Inc., at 21 (May 17, 1995); Consolidated Reply Comments of AFLAC Broadcast Group, Inc., at 5-6 (July 10, 1995). Another commenter suggested that the Commission's standards be clearly articulated and applied when "interests are coupled with certain indicia of de facto control or substantial influence." Comments of National Broadcasting Company, Inc., at 7 (May 17, 1995). Yet another commenter recommended a rebuttable presumption of attribution when an entity has more than a 50

Thus, the record does not contain facts or allegations that would support attributing debt in situations where there is no control. It is axiomatic that the Commission must establish a record of substantial evidence and provide rational support for changing its course.[25]

Moreover, the "equity and/or debt plus" proposal is overinclusive. As noted, the potential abuses described in the 1995 Attribution NPRM focused on the ability of networks to influence or even control broadcast licensees when they hold a nonattributable equity interest. Likewise, commenters suggested that nonattributable interests be aggregated only when those interests represent de facto control or substantial influence of a licensee.[26] Indeed, debt interests only raise such concerns when they are accompanied by overreaching provisions, such as those ceding to the creditor operational decision-making authority or the right to participate proportionally in profits.[27] To reach these cases without examining the facts of

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percent stake in the capitalization or equity of the enterprise. See supra note 22.

[25] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-853 (D.C. Cir. 1970) ("Greater Boston").

[26] Consolidated Comments of AFLAC Broadcast Group, Inc., at 21 (May 17, 1995); Consolidated Reply Comments of AFLAC Broadcast Group, Inc., at 5-6 (July 10, 1995); Comments of National Broadcasting Company, Inc., at 7 (May 17, 1995); and Comments of Capital Cities/ABC, Inc., at 15-16 (May 16, 1995).

[27] See, e.g., Second Report and Order at 2396 ("Likewise, financing agreements may result in a finding of affiliation if the debt relationship essentially gives the creditor the power to control the enterprise -- for example, if the size of the debt is particularly large, the terms of the loan are not commercially reasonable, and the definition of default is unconventional."). However, the Commission's suggestion that certain other contract

each case, the proposed rule would prohibit even straightforward debt relationships over a certain level in the same market. This will severely constrain the availability of debt capital to regulated entities, with an especially harsh result for small media owners.

For example, an investment in a small media owner in a single market could effectively foreclose the investor from making a more remunerative investment in a large, national media owner overlapping that market. Small owners will always be disadvantaged by these decisions, with disastrous implications for diversity and the further development of competition.[28]

The Commission's new proposal is not tailored to ensure that aggregated, non-attributed controlling interests are attributed;

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rights provide an adequate basis for attribution is not reasonable. See Further Notice at ¶ 25. Specifically, the contract rights described in note 36 of the Further Notice are typically viewed as reasonable minority shareholder or creditor protections and thus not only promote such transactions and investment but often are required as a matter of state corporate law to protect minority shareholders. See, e.g., Applications of Cleveland Television Corp. Cleveland, Ohio; Channel 19, Inc. Shaker Heights, Ohio; For a Construction Permit for a New Commercial Television Station, Decision in BC Docket Nos. 80-425, 80-426, 91 FCC 2d 1129, 1132 (1982), review denied without opinion (1983) ("Cleveland Television"), aff'd sub nom. Cleveland Television v. FCC, 732 F.2d 962 (D.C. Cir. 1984).

[28] Obviously, much of the same analysis applies to the availability of nonvoting equity capital, which, absent overreaching, generally poses no threat of harm to control and diversity and little threat to competition. Indeed, whether an appropriately insulated nonvoting equity investment poses any threat of harm to competition can only be ascertained by examining the particular circumstances of the investment in question. Factors typically analyzed in such an inquiry include, inter alia, the size of the overlap, identification of the relevant product market, the market shares of the firms involved, and the concentration of the market.

rather, it is so broadly written that numerous non-influential and non-controlling interests will be precluded, thereby restricting the capital available to regulated media entities. As the courts have stated:

> [T]he use of sweeping rather than a more refined administrative remedy may, at least in some instances, represent an improvident use of administrative discretion, in the absence of stated justification.[29]

Thus, the "equity and/or debt plus" rule is overbroad. The Commission does not outline in its Further Notice what changes have occurred which would compel it to attribute debt or aggregate debt and equity and attribute it above a certain threshold. For instance, the Commission does not explain its divergence from the 1995 Attribution NPRM in which it clearly stated that attributing debt would be harmful to the broadcast industry.

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[29] Greater Boston at 861 (citing Burlington Truck Lines v. U.S., 371 U.S. 156, 173-174 (1962)). As stated by Fox Television Stations Inc.:

> Unless the Commission can clearly identify harmful conduct that needs to be remedied by increased regulation of attributable interests, and can rationally predict that the regulations will alleviate those harms, the Commission should refrain from increasing restrictions on broadcast ownership. An agency has a significant burden to carry before it may extend old or impose new restrictions on regulated businesses. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.[sic]), cert. denied, 434 U.S. 829 (1977) (rules must be based on a rational prediction that they will remedy an identified harm); NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982) (Commission should not continue to regulate unless it can clearly identify the harm to be remedied.)

Comments of Fox Television Stations, Inc. and Fox Broadcasting Co. in MM Docket No. 94-150, at 7 (May 17, 1995).

In short, as the record stands, there is no justification for the Commission's implementation of the proposed rule.[30] If the Commission adopts the "equity and/or debt plus" rule, interests will be attributed that do not indicate a firm's ability to control a regulated media entity and that do not pose a threat of harm to competition or diversity. The rule's overinclusiveness will negatively impact the media industry because benign and efficient relationships will be discouraged, and the capital available to the media industry will be unjustifiably constrained.

Finally, the Telecommunication Act of 1996 ("1996 Act") supports procompetitive, deregulatory attribution rules. The 1996 Act mandated relaxation of the broadcast multiple ownership rules.[31] Now is not the time to further regulate the market by implementing a stricter attribution standard. Effectively, the Commission proposes taking a step backwards, rather than forwards. By increasing its regulation of the media industry through the proposed "equity and/or debt plus" rule, the

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30 The only underlying impetus for tightening the attribution standards as proposed by the Commission appears to be relaxation of the multiple ownership rules. See Further Notice at ¶ 7; see also Separate Statements of Commissioner Susan Ness and Commissioner Rachelle B. Chong. However, applying stricter attribution standards would undermine Congress' purpose in reducing the multiple ownership restrictions. Moreover, in any event, Congress' relaxation of the multiple ownership rules cannot justify increasing the scope and reach of the cross-ownership rules through the attribution mechanism.

31 See Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), Order, FCC 96-91 (released March 8, 1996).

Commission will discourage firms from holding benign equity interests and debt instruments in regulated firms and this, in turn, will reduce the overall level of investment and competitiveness in the industry.

B. The "Equity And/Or Debt-Plus" Attribution Proposal Would Increase Regulatory Uncertainty And Inefficiency.

Not only will the "equity and/or debt plus" attribution rule sacrifice the future availability of capital, it will undermine the precision of the current attribution rules by attributing benign and beneficial interests in regulated entities and creating unnecessary regulatory uncertainty. The purpose of the attribution rules is to identify the level and/or type of interest which confers upon the holder of the interest a substantial opportunity to exert influence in the management of media properties, thereby implicating control, competition and diversity concerns when a person has such an interest in more than one media outlet serving the same area.

The current attribution rules recognize that nonvoting equity, debt and certain minority voting interests in regulated entities generally do not raise control, competition or diversity concerns, and treat such interests as nonattributable.[32] The Commission considers exceptions in the context of specific cases brought to its attention.[33] Beneficial and efficient investment arrangements are promoted and administrative resources are appropriately and efficiently directed to "close" calls.

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32 See 47 C.F.R. § 73.3555 and § 76.501.

33 See, e.g., Cleveland Television.

Transactions are designed, proposed and approved at least cost to both regulated entities and the Commission. The Commission must be cautious not to undo this policy, which promotes integration efficiencies and enhances the availability of capital.

By contrast, the "equity and/or debt plus" rule will attribute interests which do not confer control and do not threaten competition or diversity. As noted above, debt and nonvoting equity interests generally only raise such concerns when overreaching is present.[34] Thus, in most cases, the proposed rule is imprecise and is contrary to one of the Commission's goals in this proceeding.[35]

Moreover, the "equity and/or debt plus" rule likely will increase regulatory uncertainty. This is because either debt or equity interests may independently result in attribution under the rule, which will require that the Commission appropriately classify each interest. The "equity and/or debt plus" rule will not obviate the need for an inquiry into specific "close" cases, it merely changes the focus of the inquiry from whether an interest is consistent with the policies underlying the attribution rules to whether the interest may be characterized as debt or equity.

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[34] As described above, whether a nonvoting equity interest will have an adverse impact on competition depends on the unique facts of a given case. For properly insulated nonvoting equity interests, the probability of harm to competition is remote.

[35] Further Notice at ¶ 1 ("Our goals in commencing this proceeding were and continue to be to maximize the precision of the attribution rules . . . .").

Finally, the proposal to attribute aggregated equity and debt interests exceeding a specified percentage of "total capitalization" would introduce a new level of uncertainty and confusion to the attribution rules, thereby inhibiting precision, reducing regulatory certainty and raising administrative costs. The Commission will be required to make difficult decisions as to what constitutes the "total capitalization" of a firm, as well as defining and delineating the investment interests which will be counted toward attribution.[36] Moreover, the "total capitalization" standard is subject to the same objections described above; the minimal administrative savings are generated only by severely limiting the availability of debt and equity capital, most of which is offered at terms raising no control, competition, or diversity issue.[37]

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[36] The "total capitalization" standard very likely will impact business decisions such as when and how to pay down or acquire new debt. The effect such regulatory distortions could have on capital markets will be impossible to predict. Such uncertainty should not be visited upon financial markets and regulated entities absent an overriding compelling public interest justification.

[37] Indeed, the question of whether multiple relationships such as equity interests, debt, or program affiliation agreements combine to raise control, competition, or diversity issues is inherently only addressable by a case-by-case analysis, because many of these relationships, even in tandem, can and do result in beneficial efficiencies. A sweeping rule treating all aggregated "interests" as harmful in order to minimize abuses also will disrupt the efficiencies the Commission's rules appropriately permit.

C. Attributing Interests In Broadcast Licensees On The Basis Of Whether The Interest Holder Is A Program Supplier To The Licensee Is An Unwarranted Extension Of The Attribution Rules.

The Commission proposes in the Further Notice to apply its "debt and/or equity plus" rule to "program suppliers" in addition to media entities otherwise subject to the cross-ownership rules.[38] The purpose of this proposal is to address the Commission's concern "that program suppliers such as networks could use nonattributable interests to exert influence over critical station decisions, including programming and affiliation choices."[39] The Commission apparently proposes to attribute ownership in a broadcast licensee to a program supplier where the program supplier also has debt and equity interests in the licensee which exceed certain thresholds.[40]

Extension of the "equity and/or debt plus" rule to program suppliers is a product of the Commission's concern that entities

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38 See Further Notice at ¶ 14.

39 Id. at ¶ 17.

40 One substantial uncertainty is the scope of the term "program supplier." TCI submits that "program supplier" should be defined as narrowly as possible; however, regardless of how the term is defined, extension of attribution to "program suppliers" will increase the costs of presently regulated entities, and will extend regulation to presently unregulated firms. As shown below, these additional costs are not justified by public interest benefits. In addition, TCI does not understand the Commission's proposal to indicate an intention to attribute ownership to entities having only a program supplier relationship with a licensee. Such a proposal would constitute an unwarranted and completely unsupported expansion of the Commission's ownership attribution rules with no corresponding benefit and could conflict with statutory provisions and other Commission rules, such as those governing access to vertically integrated cable programming. See 47 C.F.R. § 76.1002.

may acquire multiple nonattributable interests in a regulated entity and thereby acquire influence or control over key decisions of the regulated entity.[41] At present, the Commission assesses the relevance of these interests on a case-by-case basis.[42] This approach is necessary and proper because, as shown above, in most cases such interests do not pose any reasonable chance to exercise control, or harm competition and diversity. In these cases, debt and equity interests held by overlapping media entities and program suppliers serve the public interest by providing a valuable source of capital and enhancing efficiency. As Chairman Reed Hundt acknowledged last year, "I believe . . . vertical integration enhances the competitiveness of broadcast TV . . . ."[43]

The proposed rule will eliminate detailed consideration of the relative merits of debt and equity interests in licensees and instead will attribute all such interests exceeding a given threshold. While this will eliminate the need for the Commission to examine the merits of these relationships, thereby possibly conserving a relatively small amount of Commission resources,[44] it sacrifices an important source of capital by overinclusively

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[41] See, e.g., Further Notice at ¶¶ 18-19.

[42] See, e.g., BBC Licensee Subsidiary L.P. (WLUK-TV), Memorandum Opinion and Order, 10 FCC Rcd 7926 (1995).

[43] Reed Hundt, Chairman of Federal Communications Commission, News Flash! FCC Wins Oscar for Brave-Hearted Application of Antitrust Theory of Vertical Integration in Broadcasting, Address Before the American Bar Association (March 28, 1996), at 1996 FCC LEXIS 1504, at *6.

[44] Most transactions do not require extensive analysis by the Commission or its staff.

attributing ownership even where no control, competition or diversity concern is present. Thus, the rule disrupts capital markets while providing only minimal benefits in return, and, therefore, does not achieve an appropriate balance of the Commission's goals.[45]

Moreover, extending the "equity and/or debt plus" rule to program suppliers could be particularly burdensome for program suppliers with attributable interests in broadcast stations in other markets. For example, if a program supplier also was a multiple broadcast station owner, the "equity and/or debt plus" rule could limit its ability to supply programming in markets where it does not own a station because attribution in such markets could put it in violation of the multiple ownership rules.[46]

Finally, the industry segment most harmed by this rule will be smaller broadcasters which may need additional capital sources to ensure their continued competitiveness. Network programmers and other program suppliers seek to provide national coverage for their programming, but are precluded by the Communications Act and the Commission's rules from owning stations in each market.[47] Therefore, they seek out affiliates in most markets. In some markets, these program suppliers may be required to reach affiliation agreements with small, undercapitalized stations. In

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45 See Further Notice at ¶ 13.

46 See 47 C.F.R. § 73.3555(e).

47 See 47 C.F.R. § 73.3555.

these situations, nonattributable investments such as loans and passive equity may help stabilize the affiliate station's health and ensure that the station will remain capable of distributing the program supplier's programming.[48] Such relationships enhance efficiency and serve the public interest by ensuring the survival of small stations. In sum, the "equity and/or debt plus" rule applied to both overlapping media entities and program suppliers could substantially threaten small broadcast outlets nationwide.

D. The "Equity And/Or Debt Plus" Rule Will Face Substantial Implementation Problems.

The "equity and/or debt plus" rule will be difficult to implement. The Commission contemplates aggregating all equity interests, all debt interests, and all combined equity and debt interests as a percentage of total capitalization to determine if in either of these three calculations a firm's interests exceed the proposed threshold. All regulated entities will be required to assess their compliance with the new rules and make any necessary changes and/or seek clarifications and/or waivers. This will be a particularly costly process for "program suppliers," many of which may not be currently regulated. Existing investment patterns have been created based upon the current attribution structure; it will be costly to modify these patterns.

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[48] This analysis also demonstrates that nefarious intent to wrest control of a station from an unwary licensee is far from the most plausible explanation for the accumulation of interests by program suppliers.

Moreover, it is unclear at what point and how the Commission will apply its new standards. Because the total capitalization of any business is a moving target, ensuring compliance with the rule will impose significant costs on regulatees. Large firms with diversified investment portfolios particularly will be disadvantaged. These substantial implementation costs must be given considerable weight in the cost/benefit analysis of the proposed rule. Combined with the damage to capital markets and investment opportunities described above, these costs far exceed any slight administrative benefit that may be gained.

In addition, it is not clear if the Commission contemplates attributing ownership above the licensee level; and if so, whether the Commission contemplates using a multiplier. The application of the "equity and/or debt plus" rule will become even more complicated and constraining if the Commission attributes ownership above the licensee level.